IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
APPEAL FROM ORDER NO.421 2004

Shri Nitin Himanshu Sinha ..Appellant

Vs.

Shri Prakash Gopal Markale ..Respondents

Mr.R.G.Ketkar for appellant.
Mr.M.K.Kulkarni for respondent no.1.
Mr.Nitin Jamdar for respondent no.2.

CORAM: B.H.MARLAPALLE,J.

June 06, 2005.

P.C.

1. Heard Mr.Ketkar, learned counsel for the appellant-plaintiff, Mr.Jamdar, learned counsel for respondent no.2 and Mr.Kulkarni appears for respondent no.1.

2. Special Civil Suit No.333 of 2004 was filed by the appellant before the Court of Civil Judge, Senior Division at Pune on or about 17th March 2004 along with an application for temporary injunction (Exhibit 5). The said application came to be dismissed by the trial Court by the impugned order dated 6/4/2004 holding that the plaintiff failed to prove that he was in physical possession of the suit flat on the date of filing of the suit.

3. It is pertinent to note that the respondent no.2 claims to have purchased the suit flat vide deed of transfer dated 13/4/2000 from respondent no.1 and the

appellant claims to have purchased the same property through General Power of Attorney on 4/10/2002. The plaintiff further claims that pursuant to the deed of transfer dated 4/10/2002 he was put in possession of the suit property on 15/10/2002. The suit flat is located on 2nd floor of a building located in Basera Co-operative Housing Society Ltd., Survey No.19/1+8B, Plot No.25/10 and admeasuring 850 sq.ft. with open terrace of 900 sq.ft. The plaintiff claims that the consideration agreed was Rs.11,45,000/- whereas the respondent no.2 claims that he purchased the said property for Rs.5 lakhs in April 2000.

4. The moot question that is required to be considered is whether there was prima facie evidence before the Court below in support of the plaintiff's contentions that he was in physical possession of the suit flat on the date he approached the Court and answer to this issue is certainly in the negative. In the proceedings initiated by respondent no.2 before the Sub Divisional Officer at Pune in Cr.P.C. Case No.1/2003 the appellant furnished an undertaking on 11/8/2003 stating that he would not enter the suit flat until further orders. This case was decided in favour of respondent no.2 who had initiated the proceedings under Section 145 of Cr.P.C. and the appellant's challenge to the said order before the Sessions Court also failed vide order dated 4/3/2004. Though the deed of transfer has been placed on record, there is no evidence to show that on the date the appellant approached the trial Court he was in physical possession of the suit

flat. The plaintiff as well as defendant no.2 are claiming to have acquired the title through defendant no.1 to the suit property and the defendant no.1 while supporting defendant no.2 does not deny the transaction of deed of transfer signed in favour of the plaintiff as well. His letter dated 13/3/2003 addressed to the plaintiff admits the transaction and the grievance raised is that no consideration is received by the defendant no.1 though the transaction was completed through his power of attorney. In the pending suit the trial Court will be required to decide the main issue of title and until then the defendant no.1, the original owner, will have to be restrained from resorting to further alienations by any means though there is no case to allow the application at Exhibit 5 filed by the plaintiff. All the material placed on record as at present does not support the case of the plaintiff that he was in physical possession of the suit flat on 17/3/2004. At the same time the finding recorded by the Court below in the impugned order that defendant no.2 was put in possession of the suit flat is also not supported by the documents placed before the trial Court and the inference drawn by the trial Court in this regard cannot be accepted.

5. In the premises, there is no case to entertain and allow the application at Exhibit 5 filed by the appellant in Special Civil Suit No.333 of 2004 and, therefore, this appeal fails and the same is hereby dismissed in limine.

6. However, it is directed that the trial Court shall

appoint the Court Receiver for the suit flat until the pending suit is decided and such order shall be passed within a period of four weeks from today.

7. The trial of Special Civil Suit No.333 of 2004 is hereby expedited.

(B.H.MARLAPALLE,J.)